

March 15, 2000

David O. Carson, Esq.
General Counsel
Copyright GC/I&R
Southwest Station, PO Box 70400
Washington, DC 20024

Dear Mr. Carson:

The Society of American Archivists appreciates the opportunity to respond to the Notice of Inquiry issued by the Copyright Office on the "Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies" (Docket #7M99-7). The Society of American Archivists (SAA) is the oldest and largest association of professional archivists in North America. Representing more than 3,000 individuals and 400 institutions, the SAA is the authoritative voice in the United States on issues that affect the identification, preservation, and use of historical records. SAA, along with our librarian colleagues (represented by the American Library Association, the Association of Research Libraries, and the Special Libraries Association among other organizations), has a deep interest in copyright law.

We join with the library community in struggling to insure that the effect as well as the intent of copyright law protects the ability of the public to have reasonable and low-cost access, for the purposes of education and study, to published and unpublished material for *centuries to come*. We believe that without a broad exemption in Section 1201(a) for libraries, archives, and museums, the public will be denied uses that are in accordance with both Sections 107 and 108 of the Copyright Act. Indeed, without such exemptions, Sections 107 and 108 will not survive in fact even if enshrined in law. Significant cutbacks in fair access due to technological measures means the potential drastic diminution of traditional, non-infringing uses of copyrighted works that both houses of Congress said should not be altered. Just as importantly, the ability of libraries and archives to preserve and make accessible digital materials for hundreds of years—as they have done for centuries for analog material—will be severely compromised.

The Librarian's rulemaking authority in this proceeding must distinguish between technological measures that control lawful initial access from those technological measures that *control use by continually regulating access*. Many of the more sophisticated technological measures being pursued by content providers have a fine grain capability to control access continually, even after a work has been lawfully acquired. Older access

control technologies—such as scrambling cable signals or requiring passwords to access on-line digital content—effectively placed no barriers on the use made of the material by the authorized user. In effect, this older technology, like the analog technologies that preceded it, did not penalize the user with the presumption that further use was illicit. So it should continue to be: *acts of circumvention should be unlawful only when tied to actual acts of piracy or violations of copyright*. This is a reinforcement of the first sale doctrine enshrined in copyright law, which permits wide latitude to purchasers for subsequent use and sale of copyrighted material. And it is an essential condition for ensuring the long-term preservation and usability of all forms of digital material.

Without the ability of libraries and archives to make preservation copies, free from proprietary or obsolescent access control technology, there will be no means of assuring long-term access to digital material. Whether the control technology is software or hardware based, there is no reason to presume that this technology will prove any more durable than any other aspect of digital technology. Therefore, unless the content providers continue to provide updated access to every piece of content they have ever published, access to older digital copies will become impossible without “circumvention.” This is already a considerable problem for libraries that subscribe to digital journals or indexes—once their “subscription” ends, or if the content provider discontinues the service, there is nothing to which users can gain access because the libraries were prevented by access control technology (or by contract) from creating preservation copies.

Content providers have, in fact, a very poor history of preserving their copyrighted creations—witness the loss or near loss of so many early Hollywood films. Once the short-term market value has ebbed, content providers have no incentive to ensure access or use of their products. Without an exemption to prohibition on circumvention of copyright protection systems for access control technologies for libraries, archives, and museums, the critical and complicated balance of copyright law between commerce and culture will be tilted irretrievably to the former. Without the ability of archives and libraries to make preservation and use copies free from access control technologies, the long-term cultural heritage of the nation will be left to chance.

The Society of American Archivists would welcome the opportunity to provide testimony on this matter during hearings.

Sincerely,

Susan E. Fox

Executive Director